Supreme Court of the United States

October Term, 1975

~~75~~-1894

No._____

UNITED MINE WORKERS OF AMERICA, an unincorporated association; DISTRICT 6, UNITED MINE WORKERS OF AMERICA, an unincorporated association; LOCAL UNION NO. 6362, UNITED MINE WORKERS OF AMERICA, an unincorporated labor association; JOHN GUZEK, individually and as President of District 6, United Mine Workers of America, ROBERT THORNTON, individually and as President of Local Union No. 6362, United Mine Workers of America; and WILBURT BOYNES, individually and as Vice-president of Local Union No. 6362, United Mine Workers of America,

Petitioners,

vs.

WINDSOR POWER HOUSE COAL COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fourth Circuit

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Of Counsel

ERRATA SHEET

The following typographical errors are found in the Petition for Writ of Certiorari filed herewith:

1. The title paragraph, second line on page 8 should read "conflict" instead of "conflect."

2. The first paragraph, second line also on page 8 should read "anti-injunction" hyphenated, instead of "antiinjunction" together.

3. The first paragraph, fifth line also on page 8 should read "dilemma" instead of "dilemna."

4. The fourth paragraph, first line on page 9 should read "principles" instead of "principals."

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TABLE OF CASES

STATUTES

Prayer

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case February 3, 1976.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit appears at 530 F. 2d 312, (1975) as well as in the Unofficial Slip Opinion which is reprinted at App. A, p. 1a-9a, infra. The order of the United States District Court for the Northern District of West Virginia entered April 22, 1975, holding the Petitioners in contempt of Court is appended at App. B, pages 10a-14a, infra. The order of the United States District Court for the Northern District of West Virginia granting a preliminary injunction to the Respondent against the Petitioners is appended hereto at App. C, pages 15a-19a, infra.

Jurisdiction

This Court has jurisdiction under 28 U.S.C. §1254 (1). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 3, 1976. On April 26, 1976, Warren E. Burger, Chief Justice of this Court, granted Petitioners' Application and extended time for filing this Petition to and including July 1, 1976. (Order No. A-934)

Question Presented

Does a Federal District Court have jurisdiction and authority under §301 of the Labor-Management Relations Act to enjoin the members of one local union from honoring a "stranger" picket line at their employer's premises when said union and employer are parties to a binding collective bargaining agreement that contains an arbitration procedure and an implied "no-strike" pledge? Stated otherwise, does the refusal of a union to cross a "stranger" picket line create an arbitrable issue as contemplated by *Boys Markets vs. Retail Clerk's Local 770,* 390 U.S. 235 (1970).

Statutes Involved

This case involved §4, 8, and 9 of the *Norris-LaGuardia Act,* 29 U.S.C. §§104, 108 and 109 as well as §301 of the *Labor-Management Relations Act of 1947,* 29 U.S.C. §185 (a). These provisions are set forth at App. D. pages 19a - 21a, infra.

Statement of the Case

Federal Jurisdiction

The Windsor Power House Coal Company (hereinafter Windsor), Respondent, pursuant to §301 of the *Labor Management Relations Act,* brought this action against the United Mine Workers of America (International Union); District 6 of the United Mine Workers of America (District 6); Local Union 6362, United Mine Workers of America (Local) and various officers of the district and local unions for compensatory damages and injunctive relief as a result of the respective unions' alleged breach of an implied "no-strike" clause contained in the National Bituminous Coal Wage Agreement of 1974 to which all parties to this action are clearly bound.

Statement of Facts

On March 18, 1975, "stranger" or "roving" pickets appeared at the Windsor Power House Coal Company's Beech Bottom mine near Wellsburg, West Virginia. Although not identified it is clear that these pickets were not members of Local 6362, United Mine Workers of America, which represents the employees at the Beech Bottom mine. Work at the mine stopped when members of the local refused to cross this "stranger" picket line. The picketing was occasioned by a labor dispute between other coal companies and local unions not related to the Windsor operation.

On March 27, 1975, Windsor brought suit under §301 of the *Labor-Management Relations Act* as amended, 29 U.S.C. §185, against the International Union, District 6, Local Union 6362, and various officers of the district and

local union seeking damages as well as temporary and permanent injunctive relief as a result of the unions' breach of an implied "no-strike" obligation under the 1974 National Bituminous Coal Wage Agreement. The District Court for the Northern District of West Virginia entered a temporary restraining order on March 27, 1975, ordering termination of the existing work stoppage and requiring the union "[t o honor the contract between the plaintiff and the [United Mine Workers] and return to work . . ." The order concluded:

> It is further ORDERED that Windsor Power House Coal Company in accordance with the terms and conditions of the National Bituminous Coal Wage Agreement of 1974 shall arbitrate any grievance submitted by any member of the United Mine Workers employed at its Beech Bottom mine.

By order entered April 7, the temporary restraining order was extended until April 17, at 5 p.m.

The work stoppage continued in spite of the entry of the temporary restraining order, and on April 9 the Court ordered the Union to show cause why it should not be held in contempt for failing to obey the temporary restraining order. A hearing on both the show cause order and Windsor's motion for a preliminary injunction was begun on April 15. Extensive hearings were held, and on April 22 the district court entered orders on both matters. (App. B; App. C) (Oral orders were issued from the bench on April 17, 1975, holding the union Defendants and their officers in contempt of Court and also issuing a preliminary injunction.) There is no finding in the preliminary injunction order that the refusal of the members of Local 6362 to cross a "stranger" picket line created an arbitrable issue under the National Bituminous Coal Wage Agreement of 1974 (hereinafter Contract); however, the Court did observe from the bench that it felt the matter was an arbitrable issue.

Windsor and the Petitioners at all material times were parties to and governed by the Contract which is a valid collective bargaining agreement. The Contract provides a Settlement of Disputes procedure for many types of disputes ending in binding arbitration.[1] However, the contract is

[1] The jurisdictional section of that procedure provides as follows:

(Footnote continued on following page.)

silent as to whether honoring a "stranger" picket line is a difference between the union and the employer which is subject to arbitration. There is no express "no-strike" clause in the Contract although this Court in a similar provision in the 1971 Agreement has unequivocally recognized an implied "no-strike" clause. *Gateway Coal Co. vs. United Mine Workers of America,* 414 U.S. 368 (1974).

The various unions and their officers refused to file a grievance at any step of the proceedings below. The officers asserted that the refusal by the members of the Local 6362 to cross a "stranger" picket line did not create an arbitrable issue as contemplated by the Contract, and that, in large part, the refusal of the members to cross the picket line arose from fear of violence and personal harm. Accordingly, they contend that injunctive relief was not appropriate below because the mandatory requirements of *Boys Markets vs. Retail Clerk's Local 770,* 398 U.S. 235 (1970) had not been satisfied.

Proceedings Below

The Petitioners appealed the District Court's order issuing injunctive relief and, as well, its order holding the Petitioners in contempt of Court. On February 3, 1976, the United States Court of Appeals for the Fourth Circuit affirmed, in part, the orders of the District Court although a part of the contempt order was vacated and remanded. The Appeals Court decision is appended at App. A. 1a, infra.

Reasons for Granting the Writ

I. THE COURT BELOW DECIDED A FEDERAL

(Footnote continued from preceding page.)

ARTICLE XXIII — *SETTLEMENT OF DISPUTES*
Section (c) — Grievance Procedure

Should differences arise between the Mine Workers and the Employer as to meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time.

QUESTION IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME QUESTION

A significant split among the Circuit courts of Appeals has arisen as a result of the issue presented in this case, to-wit, the refusal of sister unions to cross picket lines. In the Third, Fourth, Seventh and Eighth Circuits, the Courts have held that *any* strike in violation of a no-strike clause raises an issue of contract interpretation, namely, whether the strike violates the no-strike clause, and is, therefore, arbitrable. Apparently, these Courts treat the legality of the strike itself as a sufficiently arbitrable underlying dispute for the issuance of a *Boys Markets* injunction.[3] On the other hand, other jurisdictions have concluded that the work stoppage (sympathy strike) must be *over* a grievance which both parties are contractually bound to arbitrate before a *Boys Markets* injunction may issue.[4] These Courts reject the reasoning of the other Circuits on the ground that such a construction of *Boys Markets*[5] would make every strike enjoinable during the life of a collective bargaining agreement containing express or implied "no-strike" clauses. These Courts point out that the *Boys Markets* holding was a narrow one not intended to undermine the vitality of the anti-injunctive provisions of the *Norris-LaGuardia Act.*

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[2] *Island Creek Coal Co. vs. United Mine Workers of America,* 507 F. 2d 650; *Armco Steel Corp. Vs. UMWA,* 4 Cir. 1974, 505 F. 2d 1129; *Pilot Freight Carriers Vs. Teamsters,* 4 cir. 1974, 497 F. 2d 311, cert. denied, ____ U.S. ____, 95 S. Ct. 2665, 45L. Ed. 2d 700; *Inland Steel Co. vs. UMWA,* 7 Cir. 1974, 505 F. 2d 293; *Valmac Industries, Inc. vs. Amalgamated Meat Cutters Local 425,* 8 Cir. July 29, 1975, 519 F. 2d 263, 89 L.R.R.M. 3073; *NAPA Pittsburgh, Inc. vs. Automotive Chauffers Local 926,* 3 Cir. 1974, 502 F. 2d 321 (en banc). But see *Parade Publications, Inc. vs. Philadelphia Mailers Union Local 14,* 3 Cir. 1972, 459 F. 2d 369, 374; *United States Steel Corp. vs. UMWA,* 3 Cir. 1972, 456 F. 2d 483, 487.

[3] *Boys Markets, Inc., vs. Retail Clerk's Local Union 770,* 389 U.S. 235 (1970).

[4] *Buffalo Forge Co. Vs. United Steelworkers,* 517 F. 2d 1207 (2nd Cir. 1975) (Petition for Writ Certiorari pending in this Court 75-3391); *U.S. Steel Corp. vs. UMWA,* 519 F. 2d 1236 (5th Cir. 1975); *Amstar Corp. vs. Amalgamated Meat Cutters,* 416 F. 2d 1372 (5th Cir. 1974).

[5] *Boys Markets,* supra.

The Fifth Circuit Opinion in *United States Steel vs. UMWA*[6] specifically recognizes the importance of the present issue:

> "The issue over which there is the most controversy in the Boys Markets arena, and over which there is a division in the circuits, is the refusal of sister unions to cross picket lines."[7]

This conflict in the Circuits places a serious limitation upon the ability of federal courts to follow uniform guidelines with respect to the issuance or denial of *Boys Markets* injunctions. *Buffalo Forge Company* in its Petition for Writ Certiorari made the same observation:

> "Clearly, the issue is a recurrent one affecting millions of workers and employers in each circuit of the nation. The extent of the disagreement among the circuits can be resolved only by this court."[8]

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[6] 519 F. 2d 1236, supra.

[7] Id, at 1244, n. 15.

[8] No. 75-3391 at 13.

II. THE COURT BELOW DECIDED A QUESTION OF FEDERAL LABOR POLICY IN CONFLECT WITH THIS COURT'S PREVIOUS DECISION IN *BOYS MARKETS, INC., vs. RETAIL CLERK'S LOCAL 770*

Boys Markets was an effort to judicially reconcile the antiinjunction provisions of §4 of the *Norris-LaGuardia Act,* 29 U.S.C. §104[9] with the pro-injunction implementation of §301 (a) of the *Labor-Management Relations Act,* 29 U.S.C. §185[10] The legal dilemna created by the two Congressional Acts reflected the historical evolution of the labor movement within this country in the 20th Century. *Norris-LaGuardia* was enacted to protect and insure the organizational rights of laborers whom Congress felt were at the mercy of their corporate employers (§2 *Norris-LaGuardia* - Public Policy defined). §4 of the Act was intended to protect individuals and developing labor organizations from potential governmental abuse through the reckless or arbitrary issuance of injunctions which might inhibit the various forms of collective bargaining.

With the development of labor came the growth of new forms of collective bargaining. Out of this growth came arbitration - the contractual right to have disputes between labor and management resolved by impartial umpire or referee. Through evolution of the labor movement, the machinery of arbitration would, in arbitrable disputes, become the judiciary of modern industry. Today §301 of the *Labor-Management Relations Act,* 1947,[11] is read as a codification of the power of Courts to enforce collective bargaining agreements. Prior to *Boys Markets,* however, the Courts generally held that the federal courts were precluded by the *Norris-LaGuardia Act* from enjoining a strike in breach of a no-strike provision of a collective bargaining agreement, even though such provisions would be otherwise enforceable under §301. *Sinclair Refining Co. vs. Atkinson,* 370 U.S. 195, 8 L. Ed. 2d 440, 82 S. Ct. 1328 (1962). *Boys Markets* expressly reversed *Sinclair*. Therein this Court

[9] §4 of the Norris-LaGuardia Act is found in App. D. p. 19a.

[10] §301 of the Labor-Management Relations Act, 29 U.S.C. is found in App. D., p. 20a.

[11] 29 U.S.C. §185

concluded that its ruling in *Sinclair* was inconsistent with the plethora of cases which favored peaceful settlement of labor disputes through arbitration.[12] Although favoring arbitration when the dispute between the parties may be susceptible to such coverage, it was apparent in *Boys Markets* there must first exist, between the parties, a dispute which may be arbitrated.

In *Boys Markets* this honorable Court observed that it had a duty to accommodate and reconcile the older statutes with more recent ones. *Norris-LaGuardia* was enacted in 1932; §301 of the *Labor-Management Relations Act,* in 1947. In reversing *Sinclair,* however, the Court cautioned that its ruling was not to be taken as a renunciation of *Norris-LaGuardia.* Rather, it was only a very limited exception to the proscriptions of §4. The remainder of the act remained intact:

> "Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropiate as a matter of course in every case of a strike over an arbitrable grievance." *Boys Markets,* supra, L. Ed. 2d at 212.

The Court then adopted the principals enunciated in the dissent of *Sinclair* to serve as guidelines in ascertaining whether injunctive relief would be appropriate in future cases. Before enjoining a strike over a grievance a Court must first make a finding that the grievance in question is one which the parties are contractually bound to arbitrate:

> "When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect . . ." Id at L. Ed. 2d 212.

The central issue in the instant case is whether the union's

[12] See e.g. *United Steelworkers of America vs. American Manufacturing Co.,* 363 U.S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960); *United Steelworkers of America vs. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960); *United Steelworkers of America vs. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960); *Textile Workers Unions vs. Lincoln Mills,* 353 U.S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957).

refusal to cross stranger picket lines cre ted an arbitrable issue. The Petitioners respectfully submit that the Court below too broadly construed this Court's decision in *Boys Markets*. The work stoppage at issue in the instant case was not over a grievance of the mine workers with Windsor but instead was a manifestation of the Windsor employees' deference to the picket line set up by unrelated unions. Where a dispute is solely motivated by respect for "stranger" picket lines and plainly is not aimed at resolving an existing dispute with an employer by extra-arbitral means, there can be no injunctive relief under *Boys Markets*. As pointed out in *Buffalo Forge*, a strike "not seeking to pressure the employer to yield on a disputed issue is not an attempt to circumvent arbitration machinery established by the collective bargaining agreement. It does no violence to the federal pro-arbitration policy to require federal courts to refrain from enjoining such strikes."

The Fourth Circuit's holding in the instant case contains an extremely broad reading of *Boys Markets*. The rationale of this Circuit and the others of similar persuasion ignores the fact that no dispute whatsoever existed between the employer and its employees other than the fact that the employees were not working. Employees in these cases do not seek to exert economic leverage to obtain extracontractual benefits. Nor do they seek to resolve any disputes of any kind with their employer through extra-arbitral pressures. The employees here are merely exercising First Amendment Rights of expression of their sympathies with the plight of other unions in their disputes with their own employers.

Requiring the instant parties to submit such issues to arbitration is to render the *Norris-LaGuardia Act* impotent. Morever, such a requirement clearly ignores the requirement in *Boys Markets* that an arbitrable dispute between the parties must exist before an injunction may issue. Because of the uncertainty and division within the circuits on this crucial labor issue, the guidelines and further decision of this Court are needed.

Conclusion

For the reasons stated above, this Petition for Writ

Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 75-1611

Windsor Power House Coal Company, a corporation,

Appellee,

versus

District 6 United Mine Workers of America, an unincorporated labor association,

Appellant,

and

United Mine Workers of America, an unincorporated association; Local 6362, United Mine Workers of America, an unincorporated labor association; John Guzek, individually and as president of District 6 United Mine Workers of America; Robert Thornton, individually and as president of Local 6362 United Mine Workers of America; and Wilburt Boynes, individually and as vice president of Local 6362 United Mine Workers of America,

Defendants.

No. 75-1612

Windsor Power House Coal Company, a corporation,

Appellee,

versus

United Mine Workers of America, an unincorporated association; District 6 United Mine Workers of America, an unincorporated labor association; Local 6362 United Mine Workers of America, an unincorporated labor association; John Guzek, individually and as president of District 6 United Mine Workers of America; Robert Thornton, individually and as president of Local 6362 United Mine Workers of America; and Wilburt Boynes, individually and as vice president of Local 6362 United Mine Workers of America,

Appellants.

Appeals from the United States District Court for the Northern District of West Virginia, at Wheeling. Robert E. Maxwell, District Judge.

Argued December 3, 1975 Decided February 3, 1976

Before HAYNSWORTH, Chief Judge, and CRAVEN and WIDENER, Circuit Judges.

Charles E. DeBord, II, John W. Cooper, (Pinsky, Mahan, Barnes, Watson, Cuomo and Hinerman on Brief) for Appellants; Guy Farmer, (William A. Gershuny; Farmer, Shibley, McGuinn and Flood; Herbert G. Underwood; Steptoe and Johnson on brief) for Appellees.

CRAVEN, Circuit Judge:

On March 18, 1975, "roving" pickets appeared at Windsor Power House Coal Company's Beech Bottom mine. Although not identified, it is clear that they were not members of Local 6362 of the United Mine Workers (the Beech Bottom mine local). Work at the mine stopped when members of the Local refused to cross this "stranger" picket line.[1]

On March 27, 1975, Windsor brought suit under Section 301 of the National Labor Relations Act, *as amended,* 29 U.S.C.§ 185, against the International Union, District 6, Local 6362, and various officers of the District and Local Union (hereinafter Union), seeking damages and temporary and permanent injunctive relief as a result of the Union's breach of "no-strike" obligations under the 1974 National Bituminous Coal Wage Agreement. Judge Maxwell entered a temporary restraining order on the same day, ordering termination of the existing work stoppage and requiring the Union "[t]o honor the contract between the plaintiff and the [U.M.W.] and return to work . . . ." The order concluded:

> It is further ORDERED that Windsor Power House Coal Company in accordance with the terms and conditions of the National Bituminous Coal Wage Agreement of 1974 shall arbitrate any grievance submitted by any member of the United Mine Workers employed at its Beech Bottom Mine.

By order entered April 7, the TRO was extended until April 17 at 5 p.m.

The work stoppage continued in spite of entry of the TRO, and on April 9 the court ordered the Union to show cause why it should not be held in contempt for failing to obey the tempory restraining order. A hearing on both the show cause order and Windsor's motion for a preliminary injunction was begun on April 15. Extensive hearings were held, and on April 17 the district court entered orders on both matters.

The contempt order[2] provided in relevant part:

[1]The picketing was occasioned by a labor dispute between another coal company and other locals and did not relate to the Windsor operation.

[2]Both the contempt order and the preliminary injunction were entered orally on April 17. These orders were reduced to writing and formally entered on April 22.

> [If defendants] do not fully comply with the provisions of the temporary restraining order of March 27, 1975, and the extension thereof, on or before 8:01 a.m., on April 18, 1975, and return to work, said United Mine Workers of America is hereby ORDERED assessed the sum of $10,000.00 for each and every shift of work missed at the Beech Bottom Mine of Windsor Power House Coal Company by reason of the strike or walkout thereat when work is scheduled and available at said mine; that District 6 United Mine Workers is hereby ORDERED assessed the sum of $5,000.00 for each such shift on the identical conditions; and that Local 6362 is hereby ORDERED assessed the sum of $100.00 per each such shift upon the identical conditions.

The preliminary injunction entered later on the same afternoon recited substantially the same terms as the TRO, except that the district court, apparently by inadvertence, failed to repeat the requirement that the company agree that all disputes be submitted to arbitration.[4]

The Union took this appeal from both the contempt order and preliminary injunction.

I.

The Preliminary Injunction

The basic issue presented in this appeal concerning the preliminary injunction is whether, under the rule of law laid down in *Boys Markets,*[5] the refusal of the members of Local 6362 to cross a stranger picket line falls within the

[3]App. 31-32. *See also* App. 303.

[4]Under Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970), the district court as a condition to granting any injunction must make a finding that the "strike" is "'over a grievance which both parties are contractually bound to arbitrate . . . .'" *Id.* at 254. While the district court's preliminary injunction order does not contain such a finding, upon reviewing the record of the entire proceedings it is clear that he made such a finding. *See* App. 332-38.

Omitting the requirement that the company accede to arbitration is not significant in view of the finding and the company's willingness to arbitrate. *See* Inland Steel Co. v. Mine Workers Local 1545, 505 F. 2d 293, 300 (7th Cir. 1974).

[5]Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970).

mandatory arbitration clause of its labor contract with Windsor and, as a result, is subject to injunction by the federal courts. We have held that the principle of *Boys Markets* may extend to such disputes, depending upon the contract's language. *Armco Steel Corp. v. United Mine Workers,* 505 F. 2d 1129 (4th Cir. 1974), *cert. denied,* 44 U.S.L.W. 3206 (U.S. Oct. 6, 1975); *Monongahela Power Co. v. Electrical Workers Local 2332,* 484 F.2d 1209 (4th Cir. 1973). *See also Island Creek Coal Co. v. United Mine Workers,* 507 F. 2d 650 (3rd Cir. 1975), *cert. denied,* 44 U.S.L.W. 3206 (U.S. Oct. 6, 1975); *NAPA Pittsburg, Inc. v. Automotive Chauffeurs Local 926,* 502 F. 2d 321 (3rd Cir.) (*en banc*), *cert. denied,* 419 U.S. 1049 (1974). *But see United States Steel Corp. v. United Mine Workers,* 519 F.2d 1236 (5th Cir. 1975); *Buffalo Forge Co. v. United Steelworkers,* 517 F.2d 1207 (2d Cir. 1975); Note, Injunctions--Federal Courts May Enjoin Work Stoppage When Its Legality Is Arbitrable Issue, 88 Harv. L. Rex. 463 (1974).

Furthermore, in *Armco Steel, supra,* we held that just such a failure to cross a stranger picket line was within the mandatory arbitration clause of the 1971 National Bituminous Coal Wage Agreement. *See also Island Creek, supra.* We have not found, and neither party to this appeal has suggested, any material difference between the relevant provision of the 1971 labor contract and a similar provision of the 1974 Agreement.[6] We adhere to our prior decisions.

Secondly, the Union urges that the conduct of its members came within the "preservation of Individual Safety Rights" provision of the 1974 contract[7] and that this clause is a

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[6] The jurisdictional language for arbitration cases in the 1974 Contract is found in Article XXIII § (c). It reads, in relevant part, as follows:

> Should differences arise between the Mine Workers and the Employer as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time [in accordance with the Agreement's grievance-arbitration procedures].

[7] Article III, Section (i) of the 1974 Agreement provides in pertinent part:

> Section (i) Preservation of Indivisual Safety Rights

(Footnote continued on following page.)

specific exception to the implied no-strike provisions of the Agreement. We are inclined to think that the Preservation of Individual Safety Rights was designed and intended to establish a procedure for correcting dangerous working conditions in the mines and has nothing to do with picketing. It is true, as the Union suggests, that crossing a picket line may provoke violence. But that does not appear to be among the dangers for which the procedure was designed. We need not, however, decide the question because it is clear that the procedure established by the safety rights clause was not invoked here.

The "Preservation of Individual Safety Rights" provision of the labor agreement sets out a detailed procedure for

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(Footnote continued from preceding page.)

> (1) No Employee will be required to work under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. When an Employee in good faith believes that he is being required to work under such conditions he shall notify his supervisor of such belief. Unless there is a dispute between the Employee and management as to the existence of such condition, steps shall be taken immediately to correct or prevent exposure to such condition utilizing all necessary Employees, including the involved Employee.
>
> (2) If the existence of such condition is disputed, the Employee shall have the right to be relieved from duty on the assignment in dispute. Management shall assign such Employee to other available work not involved in the dispute; and the Employee shall accept such assignment at the higher of the rate of the job from which he is relieved and the rate of the job to which he is assigned. The assignment of such alternative work shall not be used to discriminate against the Employee who expresses such belief. If the existence of such condition is disputed, at least one member of the Mine Health and Safety Committee shall review such condition with mine management within four (4) hours to determine whether it exists.
>
> (4) For disputes not otherwise settled, a writted grievance may be filed, and the dispute shall be referred immediately to arbitration. Should it be determined by an arbitrator that an abnormally unsafe or abnormally unhealthy condition within the meaning of this section existed, the Employee shall be paid for all earnings he lost, if any, as a result of his removing himself from his job. In those instances where it has been determined by an arbitrator that an Employee did not act in good faith in exercising his rights under the provisions of this Agreement, he shall be subject to appropriate disciplinary action, subject, however, to his right to file and process a grievance.

asserting such rights: (1) "When an Employee in good faith believes that he is being required to work under (abnormally and immediately dangerous) conditions he shall notify his supervisor of such belief." (2) If there is no dispute between the Employee and management as to the existence of the dangerous condition, "steps shall be taken immediately to correct or prevent exposure to such condition." (3) "If the condition is disputed, the Employee shall have the right to be relieved from duty on the assignment in dispute (and) . . . at least one member of the Mine Health and Safety Committee shall review such condition with mine management within four (4) hours to determine whether it exists." (4) "For disputes not otherwise settled, a written grievance may be filed, and the dispute shall be referred immediately to arbitration."

There is nothing in the record to indicate that any member of the Union ever invoked this provision by bringing the issue to the attention of Windsor in the manner required. *Cf. Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 383-84 (1974). We, therefore, hold that the preliminary injunction issued properly.

II.

The Contempt Order

For purposes of this appeal, the effect of the contempt order is determinable by whether it is characterized as criminal or civil in nature. If it is criminal contempt, it is properly before us on appeal and must be reversed because the court failed to afford the Union the panoply of rights available to defendants in criminal proceedings. If it is civil contempt, it is not appealable "'except in connection with appeal from a final judgment in the main action.'" *Carbon Fuel Co. v. United Mine Workers,* 517 F.2d 1348, 1349 (4th Cir. 1975).

In *Carbon Fuel, supra,* we defined civil contempt as follows:

> Civil contempt, on the one hand, is "'wholly remedial,' serves only the purpose of a party litigant, and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by noncompliance."

517 F. 2d at 1349. This definition has two parts: (1) civil contempt is forward-looking, "terminable if the contemnor purges himself of the contempt" and (2) it is " compensatory"of any losses sustained by the (injured party) as a result of the contempt." *Id.* at 1349-50.

Clearly Judge Maxwell's order satisfied the first part of the test--it was prospective in application. The fine for contempt was to begin accruing only if workers did not return to work at the 8:01 a.m. shift on April 18, and it increased in amount only as each succeeding shift failed to resume work.

However, it is not clear that the court's order was intended to compensate Windsor for its losses as a result of the contempt. The total daily fines amounted to approximately $45,000, and the record contains no "'evidence of complainant's actual loss'" which approached that figure.[8] *See Carbon Fuel, supra* at 1350. Furthermore, the payment of the fine was to be made here to the clerk of court, not Windsor, which we specifically identified in *Carbon Fuel* as a characteristic of criminal contempt.

Windsor has represented to this court, both in its brief and at oral argument, that the contempt order is not final. It contends that in subsequent proceedings the fine's payment may be directed to Windsor and adjustment may be made in its amount to match the contemnor's conduct. We do not understand the Union to dispute these contentions. Accordingly, we hold that the court's order is civil in nature and presently not appealable.

On remand, the district court will treat its contempt order as tentative and, in an effort to balance all pertinent factors to achieve a fair and just result, will carefully consider both the actual damages incurred by Windsor during the period from entry of the contempt order until work was resumed

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[8] Windsor does not contend that it lost $45,000 per day. Its claim is that the "amount of the Company's daily loss was established to be $6,625.0[0] per day . . ." Brief for Appellee at 15.

and the character of the efforts made by the Union and others to achieve compliance.[9]

AFFIRMED IN PART, VACATED, AND REMANDED.

[9] We note that the district court previously characterized these efforts as "good faith affirmative action."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

WINDSOR POWER HOUSE COAL COMPANY, a corporation,

Plaintiff,

v. Civil Action No. 75-8-W

UNITED MINE WORKERS OF AMERICA, an unincorporated association; DISTRICT 6 UNITED MINE WORKERS OF AMERICA, an unincorporated labor association; LOCAL 6362 UNITED MINE WORKERS OF AMERICA, an unincorporated labor association; JOHN GUZEK, as President of District 6 United Mine Workers of America; ROBERT THORNTON, as President of Local 6362 United Mine Workers of America; and WILBURT BOYNES, as Vice-President of Local 6362 United Mine Workers of America,

Defendants.

ORDER

On the 15th day of April, 1975, came the plaintiff, Windsor Power House Coal Company, by Herbert C. Underwood, its attorney; the defendants United Mine Workers of America, Local 6362 United Mine Workers of America, Robert Thornton and Wilburt Boynes by John Cooper and Charles DeBord, their attorneys; and the defendant District 6 United Mine Workers of America and John Guzek by H. John Rogers, their attorney, all pursuant

to the Order of this Court entered on the 9th day of April, 1975, pursuant to a motion therefor by the plaintiff, whereby said defendants were required to show cause why they should not be adjudged in contempt of this Court by reason of their respective violations of the temporary restraining order entered in this Civil Action on the 27th day of March, 1975, and the order of this Court entered on the 7th day of April, 1975, whereby said temporary restraining order was extended for ten days pursuant to the provisions of Rule 65(b) of the Federal Rules of Civil Procedure.

It appearing to the Court that on the 27th day of March, 1975, the plaintiff caused to be filed in this Court its verified complaint seeking, among other matters, issuance of a temporary restraining order against the defendants herein; that pursuant to notice of said motion said defendants, by counsel, appeared in open court; that predicated upon affidavits filed by the plaintiff and testimony that day taken, this Court issued a temporary restraining order; that said order was extended prior to its expiration through 5:00 p.m., on the 17th day of April, 1975; that plaintiff's motion seeking an order requiring the defendants to show cause why they should not be adjudged in contempt of the order of this Court was duly filed, together with supporting affidavits, the Court proceeded to hear testimony upon the issues raised by the Order to Show Cause and the defendants' resistance thereto.

The testimony not being concluded on the 15th day of April, 1975, the parties and their attorneys returned to open court on the 16th day of April, 1975, and the Court continued to hear testimony upon the issues framed. Upon conclusion of the testimony and after hearing argument of counsel and reviewing the evidence presented, the Court reserved its decision until the 17th day of April, 1975, when, after due deliberation, the Court did find as follows:

1. The defendants United Mine Workers of America, District 6 United Mine Workers of America, Local 6362 United Mine Workers of America, John Guzek, as President of District 6 United Mine Workers of America, Robert Thornton, as President of Local 6362 United Mine Workers of America, and Wilburt Boynes, as Vice President of Local 6362 United Mine Workers of America, had full knowledge of the existence of said temporary restraining order and the terms thereof and the extension thereof and did in the

Northern Judicial District of West Virginia knowingly and intentionally violate said temporary restraining order and the extension thereof, and did on diverse days beginning with March 27, 1975, and continuing thereafter with full knowledge of said temporary restraining order and the extension thereof did not terminate the strike or walkout at the plaintiff's Beech Bottom Mine; that its orders and directions given did not cause the members of defendant Local and others acting in concert with them to cease all picketing activities at the Beech Bottom Mine, and did not honor the contract between the plaintiff and the United Mine Workers of America and return and cause to return to work members of the United Mine Workers of America employed at the Beech Bottom Mine of the plaintiff.

2. Said United Mine Workers of America, District 6 United Mine Workers of America, Local 6362 United Mine Workers of America, John Guzek as President of District 6 United Mine Workers of America, Robert Thornton as President of Local 6362 United Mine Workers of America and Wilburt Boynes as Vice President of Local 6362 United Mine Workers of America, have failed to show why they should not be adjudged in contempt of this Court's temporary restraining order and the extension thereof.

3. That the defendants international and district took good faith affirmative action at mines owned and operated by other than the plaintiff herein, both in Ohio and West Virginia, in an effort to resolve the dispute between various locals and the mine owners, but such efforts did not terminate the work stoppage at plaintiff's Beech Bottom Mine.

It is therefor ADJUDGED AND ORDERED that the defendants, United Mine Workers of America, District 6 United Mine Workers of America, Local 6362 United Mine Workers of America, John Guzek as President of District 6 United Mine Workers of America, Robert Thornton as President of Local 6362 United Mine Workers of America and Wilburt Boynes as Vice President of Local 6362 United Mine Workers of America, are and have been in contempt of this Court for having failed and refused to obey the temporary restraining order issued by this Court on the 27th day of March, 1975, and the extension thereof.

It appearing to the Court that the interests of the parties

hereto can best be served by prospective application of any sanctions resulting from said contempt, it is hereby ORDERED that in the event said United Mine Workers of America, District 6 United Mine Workers of America, Local 6362 United Mine Workers of America, John Guzek as President of District 6 United Mine Workers of America, Robert Thornton as President of Local 6362 United Mine Workers of America and Wilburt Boynes as Vice President of Local 6362 United Mine Workers of America, do not fully comply with the provisions of the temporary restraining order of March 27, 1975, and the extension thereof, on or before 8:01 a.m., on April 18, 1975, and return to work, said United Mine Workers of America is hereby ORDERED assessed the sum of $10,000.00 for each and every shift of work missed at the Beech Bottom Mine of Windsor Power House Coal Company by reason of the strike or walkout threat when work is scheduled and available at said mine; that District 6 United Mine Workers is hereby ORDERED assessed the sum of $5,000.00 for each such shift on the identical conditions; and that Local 6362 is hereby ORDERED assessed the sum of $100.00 per each such shift upon the identical conditions.

It is further ORDERED that the defendants Robert Thornton and Wilburt Boynes as President and Vice President, respectively, of Local 6362 United Mine Workers of America, are required to appear and work their regularly scheduled shifts at plaintiff's Beech Bottom Mine, and in the event they do not do so, they are hereby ORDERED assessed the sum of $50.00 for each and every shift so missed following 8:01 a.m. on April 18, 1975.

If said Thornton and Boynes do not so work by reason of their failure or refusal to cross any picket line at the Beech Bottom Mine of the plaintiff, when they are regularly scheduled to work during the effective period of this Court's order entered on the 22nd day of April, 1975 and effective on the 17th day of April, 1975, granting to the plaintiff a preliminary injunction, the Court will not, in a punitive fashion, compel them, or either of them, to cross such picket line, but it shall be the responsibility of said defendants Thornton and Boynes, in purging themselves of contempt of this Court's order, to come forward and identify such pickets as may be preventing them, or either of them, from carrying

out the order of this Court.

To the above adverse findings and orders all the defendants object.

Insofar as the motion of the plaintiff sought an Order to Show Cause from Andrew Morris, there is a total failure of any evidence demonstrating any contemptous conduct on the part of Andrew Morris, and he is ORDERED dismissed from this civil action.

Dated: April 22, 1975

Robert E. Maxwell
United States District Judge

Approved:

Herbert Underwood
Attorney for Plaintiff

Approved as to Form Only:

John W. Cooper

Charles E. DeBord II
Attorneys for Defendants

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

WINDSOR POWER HOUSE COAL COMPANY, a corporation,
Plaintiff,

v. Civil Action No. 75-8-W

UNITED MINE WORKERS OF AMERICA, an unincorporated association; DISTRICT 6 UNITED MINE WORKERS OF AMERICA, unincorporated labor association; LOCAL 6362 UNITED MINE WORKERS OF AMERICA, an unincorporated labor association; JOHN GUZEK, as president, of District 6 United Mine Workers of America; ROBERT THORNTON, as president of Local 6362 United Mine Workers of America; and WILBURT BOYNES, as vice president of Local 6362 United Mine Workers of America,

Defendants.

ORDER

On the 17th day of April, 1975, came the plaintiff by Herbert C. Underwood its attorney of record and came the defendants by John Cooper and Charles DeBord, pursuant to the orders of this Court made and entered on the 27th day of March, 1975, and the 7th day of April, 1975, setting plaintiff's motion for a preliminary injunction for hearing on this date.

The Court has considered the verified complaint and the motion for a preliminary injunction incorporated therein filed by the plaintiff; the affidavits in support thereof; the testimony adduced by the parties plaintiff and defendant in open court and the exhibits filed throughout the course of this civil action including all of the evidence adduced by reason of the plaintiff's motion for an order requiring the defendants to show cause why they should not be held in contempt of the temporary restraining order entered by this Court.

The Court is of the opinion upon all of the foregoing that it has been clearly shown that the plaintiff will suffer irreparable damage if a preliminary injunction is not awarded herein, by reason of the following facts:

(a) plaintiff's present inability to proceed with the mining and production of coal at its Beech Bottom Mine will result in an irreparable loss to it not compensable by the payment of the damages.

(b) The plaintiff will be unable to meet its contractual commitments for the delivery of coal for the generation of electrical energy.

(c) Continuation of the strike or walkout will result in an irrevocable loss to the plaintiff of a sum in excess of $25,000.00 each day.

(d) The inability, in the face of the walkout or strike, of the plaintiff to meet its contractual commitments for the delivery of bituminous coal may exacerbate the presently existing electrical energy shortage in the Eastern United States, with a consequent increase in the inconvenience and discomfort of the citizens of these states by reason of such power shortage.

By reason of the foregoing, the Court is of the opinion that the issuance of a preliminary injunction is appropriate, and it is hereby ORDERED that a preliminary injunction issue against United Mine Workers of America; District 6 United Mine Workers of America; Local 6362 United Mine Workers of America; John Guzek, as president of District 6 United Mine Workers of America; Robert Thornton, as president of Local 6362 United Workers of America, and Wilburt Boynes, as vice president of Local 6362 United Mine Workers of America, and each of them, and all other members of defendant Local, and all other persons in active concert or

participation with said Local, and its agents, and they are hereby ORDERED and directed, until further order of this Court, as follows:

1. To terminate immediately the strike or walkout which began on March 18, 1975, and continues to the present time at the Beech Bottom Mine of Windsor Power House Coal Company, located in Ohio and Brooke Counties of West Virginia.

2. To terminate the present strike or walkout and order or direct the members of the defendant Local, and all others acting inconcert with them, to cease all picketing activity at the Beech Bottom Mine.

3. That the defendants, and each of them, and all members of the Local and those acting in concert with them, who receive actual notice hereof, refrain from ordering, calling, directing, encouraging, maintaining or participating in the strike and walkout and picketing at the Beech Bottom Mine until the further order of this Court.

4. To honor the contract between the plaintiff and the United Mine Workers of America and return to work at the Beech Bottom Mine of Windsor Power House Coal Company.

It is further ORDERED that this preliminary injunction shall not take effect until the plaintiff, or some person or persons in its behalf, executes before the Clerk of this Court a bond in the penalty of $10,000.00, conditioned to pay such costs as may be awarded against the plaintiff and such damages as may be sustained by the defendants, or any one of them, in case the preliminary injunction herein awarded shall hereafter be dissolved.

It is further ORDERED that service of a copy of this order, duly certified by the Clerk of this Court, upon the attorneys of record for the defendants and posting of a duly certified copy thereof at the entrances to the Beech Bottom Mine and in close proximity shall constitute notice to the defendants, and all persons aiding, abetting or acting in concert with them, of the award of this preliminary injunction and of the requirements thereof.

To the above adverse findings and orders all the defendants object.

Entered: April 22, 1975

Robert E. Maxwell
United States District Judge

Approved:

Herbert G. Underwood
Attorney for Plaintiff

Approved as to Form Only:

Charles E. DeBord II

John W. Cooper
Attorneys for Defendants

APPENDIX D

Norris-LaGuardia Act §4
Title 29 U.S.C. §104

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Norris-LaGuardia Act §8
Title 29 U.S.C. §108

§ 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Norris-LaGuardia Act §9
Title 29 U.S.C. §109

§ 109. Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

Labor Management Relations Act of 1947 §301
Title 29 U.S.C.§185

§ 185. Suits by and against labor organizations - Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an

industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.